Supreme Court, U.S.
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No. 08 975

# In The Supreme Court of the United States

CLYDE E. CLEMENTS, JR.,

*Petitioner,*

v.

MICHAEL B. MUKASEY, in his official capacity of United States Attorney General and JOHN G. ROBERTS, in his official capacity of Chief Justice, Supreme Court of the United States,

*Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Petitioner's proposed amended complaint contains the allegation that the *pro se* plaintiff was injured by federal circuit judges' delegating their Article III appellate judicial powers to staff personnel in said personnel's handling of said plaintiff's *pro se* filed employment discrimination case appeal petitions with no actual nor meaningful judicial supervision, and; that facially neutral Supreme Court Rules 10 and 20.1 work to the disadvantage of *pro se* petitioners denied actual judicial scrutiny by lower appeals courts.

The Questions Presented are:

1. Whether the complaint is sufficient for stating a claim of Appointments Clause and Due Process Clause violations; and

2. If so, whether Petitioner will be allowed to amend his complaint as requested in his motion for leave to amend denied by the District Court below?

## PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the District of Columbia Circuit.

The petitioner here and appellant below is Clyde E. Clements, Jr.

The respondents here and appellees below are Honorable Michael B. Mukasey, in his official capacity of United States Attorney General; and Honorable John G. Roberts, in his official capacity of Chief Justice, Supreme Court of the United States.

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## OPINIONS AND ORDERS BELOW

The orders of the Court of Appeals are per curiam and are reprinted in the Appendix to the Petition ("Pet. App.") at 1a-2a, 3a-4a and 5a-6a. The District Court's opinions are reprinted at Pet. App. 7a-13a and 14a-24a.

## JURISDICTION

The District Court entered its Order denying Petitioner's motion to vacate; and for leave to amend his complaint on January 15, 2008. The District Court had subject matter jurisdiction under 28 U.S.C. § 1331. The District Court's general federal question jurisdiction was invoked under the Fifth Amendment. The Court of Appeals filed its Order refusing Petitioner's Petition for Appeal on July 11, 2008 (Pet. App. 5a-6a); and filed its final Orders denying Petitioner's Petition for Rehearing and Rehearing *En Banc* on October 30, 2008 (Pet. App. 1a-2a and 3a-4a). The Court of Appeals had jurisdiction to review the District Court's final judgment pursuant to 28 U.S.C. § 1291. No motion for extension of time for filing a Petition for Certiorari has been filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the U.S. Constitution states, in relevant part, that "Congress shall make no law *** abridging the right of the people to ***

petition the Government for a redress of grievances."

Fifth Amendment to the U.S. Constitution states, in relevant part, "* * * nor shall any person be deprived of life, liberty, or property, without due process of law * * *."

The United States Constitution, art. II, § 2, cl. 2, provides:

> [The President] by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

28 U.S.C. § 2071, which states, in relevant part, ". . . rules promulgated by the Supreme Court . . . must be consistent with Acts of Congress. . . ."

## STATEMENT OF THE CASE

On October 19, 2006, Clyde E. Clements, Jr., ("Clements" or "Petitioner"), acting *pro se*, brought an action in the United States District Court for the District of Columbia ("District Court"), Civil Action No. 06-1809 (RBW), against the United States Congress and the United States Supreme Court ("the defendant"

or "the respondent") as a challenge to the constitutionality of Supreme Court Rules 10 and 20.1 both facially and as applied to him. DE 1.[1] This action was preceded by Petitioner's submission of seven petitions for review by this Court.[2] This Court denied each petition without reaching the merits of Clements' claims. The most recent is his petition for a writ of mandamus, In Re Clyde E. Clements, Jr., Case No. 05-689, denied by this Court on February 21, 2006.

Without having advised Clements, then *pro se* plaintiff, of the heightened pleading standard of the District of Columbia Circuit; and without having given him even minimal notice of the District Court's pleading requirements, which would have been consistent with *Moore v. Agency for International*

---

[1] "DE __" refers to the docket entry numbers on the docket sheets maintained by the District Court below.

[2] In the underlying federal court suit in which five of the petitions were filed, Petitioner alleges that the panel decision of the United States Court of Appeals for the Fourth Circuit (hereinafter referred to as "VA.App.Ct") to affirm the United States District Court for the Western District of Virginia (hereinafter referred to as "VA.Distr.Ct") decision to grant defendants' motion for summary judgment was erroneous because said VA.Distr.Ct record contains the causation element of his retaliatory discharge claim as well as genuine disputes of material fact that were overlooked by said district court and said appeals court. The other two petitions relate to Petitioner's Virginia state court civil action that contains his state tort claims that had been struck from the complaint by said VA.Distr.Ct with no reason given.

*Development*, 994 F.2d 874, 877 (D.C. Cir. 1993) ("... the district court should give the pro se litigant at least minimal notice of our pleading requirements. ..."), the District Court, on June 27, 2007, entered its Order dismissing Clements' complaint with prejudice. DE 14.

The District Court's analysis includes its finding that:

> . . . the Court also notes as an initial matter that it lacks jurisdiction over the plaintiff's complaint in two distinct respects. To begin with, the plaintiff has identified no private right of action ... In addition, it is plain that the Court lacks subject-matter jurisdiction in this case pursuant to the doctrine of sovereign immunity. . . . because the Court can envision no set of facts that the plaintiff could realistically prove that would corroborate his claim of pervasive "judicial tyranny," Pl.'s Opp. at 2, and "judicial fraud," Compl. ¶ 3, directed against him, the Court concludes that the plaintiff's complaint has clearly failed to state a claim upon which relief can be granted. . . .

DE 14 at 4, 7. See Pet. App. 19a, 23a, 24a.

On July 12, 2007, the District Court filed Clements' Motion to Vacate; and for Leave to File Amended Complaint (DE 15), with his proposed First

Amended Complaint ("1st.Am.Cplt") attached. In response to the District Court's finding that "... no private right of action exists to enforce the statutes relied upon by the plaintiff in his complaint. ...", Clements included the following in his said 1st.Am.Cplt:

> Defendant Supreme Court has provided clear authority on the constitutional requirement that the lower appeals courts provide fair, effective and meaningful appeals. "... Due process requires that a right to appeal be a right to an '"adequate and effective' appeal" which is "more than a 'meaningless ritual.'" ... *Burkett v. Cunningham*, 826 F.2d 1208 at 1221. ... A cause of action is implied directly under the Constitution when the Due Process Clause is violated. "... where the plaintiff rested her claim directly on the due process clause of the Fifth Amendment, alleging that her rights under that Amendment had been violated and that only the judiciary could vindicate those rights, plaintiff was an appropriate party to invoke the general federal question jurisdiction of the district court to seek relief and had a cause of action under the Fifth Amendment; ... a remedy in damages would be available if plaintiff were able to prevail on the merits of her constitutional claim..." *Davis v. Passman*,

> 442 U.S. 228 at 228, 99 S.Ct. 2264 at 2264.

Proposed 1st.Am.Cplt, ¶¶ 4, 15. DE 15. Further, Clements left out of his proposed 1st.Am.Cplt those allegations subject of the District Court's finding that it lacked subject-matter jurisdiction pursuant to the doctrine of sovereign immunity (Pet. App. at 19a).

On January 15, 2008, the District Court entered its Order denying Clements' Motion to Vacate; and for Leave to File Amended Complaint. DE 19. The District Court does not state in said Order that it finds that it appears beyond doubt that Clements can prove no set of facts in support of his claims of violation of his Due Process Clause-related rights, which would entitle him to relief. The District Court does, however, state:

> In actuality, these cases [*Burkett*, Id.] stand for the incontrovertible principle that "the Due Process clause protects the right to direct appeal when that right is guaranteed by the state." . . .
>
> In short, the plaintiff cannot plead around the fact that the Supreme Court is neither constitutionally nor statutorily required to accept his petitions for a writ of certiorari. The plaintiff's proffered amended complaint, if accepted for filing, would only be subject to dismissal once again for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

> His proposed amendments are therefore futile. . .

District Court Order, DE 19, at 4, 5. See Pet. App. 11a–13a. The District Court cites no precedent, no text, and no policy in support of abovementioned statement, "... plaintiff cannot plead around the fact that the Supreme Court is neither constitutionally nor statutorily required to accept his petitions for writ of certiorari." On March 13, 2008, the District Court entered Clements' Notice of Appeal. DE 20.

On April 7, 2008, the United States Court of Appeals for the District of Columbia Circuit ("Appeals Court" or "Court of Appeals") filed Clements' motion for summary reversal (styled "Motion for Remand") ("Mo.Remand" or "motion for summary reversal"), with his proposed Second Amended Complaint ("2nd.Am.Cplt") attached thereto as "Exhibit B." In said Mo.Remand, Clements states that he moves the Appeals Court to reverse the District Court's Order denying him leave to amend; and remand with instructions for the District Court to grant him leave to file his attached proposed 2nd.Am.Cplt on the grounds that "it cannot be said that, as a matter of law, I am not entitled to relief under my amended complaint."

Clements also states in Mo.Remand:

> The District Court, in said [January 15, 2008] Order ... states, "In short, the plaintiff cannot plead around the fact that the Supreme Court is neither

> constitutionally nor statutorily required to accept his petitions for a writ of certiorari. The plaintiff's proffered amended complaint, if accepted for filing, would only be subject to dismissal once again ... His proposed amendments are therefore futile..." ... The District Court is, in essence, saying, "Supreme Court Rules 10 and 20.1 are not unconstitutional because they are constitutional. Therefore, any challenge as to their constitutionality is futile." I respectfully submit that whether said Rules 10 and 20.1 are constitutional; or, are unconstitutional in the context of the facts alleged in my amended complaint, must be determined at trial.

See said Clements' Mo.Remand at 2.

Clements, in said proposed 2nd.Am.Cplt, includes the allegation:

> Facially neutral S.Ct. Rules [10 and 20.1] are unconstitutional because they work to the disadvantage of *pro se* appellants who, like Plaintiff, are denied actual judicial scrutiny by the lower federal appeals court; and, like Plaintiff, are injured by said appeals court's affirming decisions of the court of first instance that said appeals court knows or should know are erroneous and reversible. ...

> said Circuit Judges delegated their Article III judicial power to the Appeals Court [Referring to VA.App.Ct] staff attorneys and/or clerks; and that review of Plaintiff's appeal via abovementioned 'screening' process was handled entirely by said staff attorneys and/or clerks without actual or meaningful supervision by any circuit judge."

See ¶¶ 1 and 11 of said proposed 2nd.Am.Cplt, attached to Clements' motion for summary reversal as "Exhibit B."

Clements also alleges in his said proposed 2nd.Am.Cplt, that:

> Plaintiff avers herein that said lower appeals court's denying him actual judicial scrutiny has resulted in violation of his right of access to the courts under the Petition Clause of the First Amendment; and under the Due Process Clause of the Fifth Amendment to the United States Constitution. Plaintiff has no effective means other than the judiciary to vindicate those rights.

See proposed 2nd.Am.Cplt, ¶ 3, attached to Petitioner's motion for summary reversal as "Exhibit B."

On July 11, 2008, the Appeals Court filed its per curiam Order (Pet. App. at 5a, 6a) denying Clements'

motion for summary reversal; denying Clements' unopposed motion to file his surreply; granting defendants' motion for summary affirmance, holding that the District Court did not abuse its discretion on futility grounds; and withholding issuance of mandate.

On August 25, 2008, the Appeals Court filed Clements' petition for rehearing and rehearing en banc. On October 30, 2008, the Appeals Court filed its Order denying Clements' petition for rehearing (Pet. App. at 3a, 4a); and its Order denying Clements' petition for rehearing en banc (Pet. App. at 1a, 2a). On November 3, 2008, the Appeals Court filed Clements' motion to stay mandate pending disposition of a petition for a writ of certiorari.

## REASONS FOR GRANTING THE PETITION

### I. This Case Presents A Structural Constitutional Violation Issue.

Petitioner's allegation of an Appointments Clause violation was not raised in the District Court; nor in the Appeals Court. It is raised for the first time in this Court by means of this petition. However, case law has established that this Court may still hear these objections:

> ... *Glidden* [*Co. v. Zdanok*, 370 U.S. 530] expressly included Appointments Clause objections to judicial officers in the category of nonjurisdictional structural constitutional objections that could be considered on appeal whether or not they were ruled upon below: "... the claim that an intercircuit assignment ... usurped the presidential appointing power under Art. II, § 2, was heard here and determined upon its merits, despite the fact that it had not been raised in the District Court or in the Court of Appeals or even in this Court until the filing of a supplemental brief upon a second request for review." *Glidden*, 370 U.S. at 536, ...

*Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 at 878, 879.

Petitioner includes in his proposed 2nd.Am.Cplt

the following allegations:

> The Appeals Court [United States Court of Appeals for the Fourth Circuit] employs a system of screening *pro se* appeals. "Under Judge Sobeloff's leadership, therefore, and with the help of a young lawyer employed in the Clerk's office, we began a system of screening postconviction and other *pro se* appeals. . . ." *Jones v. Superintendent, Virginia State Farm,* 465 F.2d 1091, 1094 (C.A. 4, 1972). ... Plaintiff avers herein that his petition for appeal was denied actual judicial scrutiny by the Appeals Court. The three circuit judges ("Circuit Judges") whose names appear on said Per Curiam Opinion of the Appeals Court had nothing to do with said opinion–they did not review the record of Plaintiff's case; they provided no actual supervision of the drawing up of the Per Curiam Opinion; and they did not give their actual approval for said Per Curiam Opinion to be entered. Plaintiff further avers that his petition for rehearing with suggestion for rehearing in banc was also denied actual judicial scrutiny. ... Plaintiff avers herein that said Circuit Judges delegated their Article III judicial power to the Appeals Court staff attorneys and/or clerks; and that review of Plaintiff's appeal via abovementioned "screening"

> process was handled entirely by said staff attorneys and/or clerks without actual or meaningful supervision by any circuit judge. ... "Her [Judge Edith Jones of the Fifth Circuit] mid-90s prescription for 'rationing justice' identifies those to whom rationing is to be administered as those who originally inspired the Fourth Circuit to develop modern institutionalized unpublication–prisoners ... and another class of litigants characteristically singled out for 'screening' away from actual judicial scrutiny: pro se appellants. ..." *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, Penelope Pether, 39 Ariz. St. L.J. 1 (2007), at Page 14. ...

Petitioner's proposed 2nd.Am.Cplt at ¶¶ 9-11, 14.

Petitioner was not aware of the VA.App.Ct (federal Fourth Circuit) practice of "screening *pro se* appeals" and its alleged practice of "'screening away' from actual judicial scrutiny pro se appellants" until he had read abovementioned Professor Pether's law review paper, *Sorcerers, Not Apprentices* ... in February, 2008, which was after he had filed in the District Court on July 12, 2007 his Motion to Vacate; and for Leave to File Amended Complaint with attached proposed 1st.Am.Cplt (It is Petitioner's understanding that said *Sorcerers* paper was published in Arizona Law Journal in May, 2007; and that it was

available earlier on a web site). Therefore, while Petitioner's Due Process Clause violation claims appear in both his proposed 1st.Am.Cplt and in his proposed 2nd.Am.Cplt, his allegations relating to the Fourth Circuit's said screening away his appeals petitions from actual judicial scrutiny appear for the first time in his proposed 2nd.Am.Cplt, which was filed in the Appeals Court as "Exhibit B" attached to his motion for summary reversal.

**A. This Case Presents an Appointments Clause Violation Issue**

Case law establishes that an unauthorized act by the judicial branch that works to usurp the appointment power of the executive branch is a violation of the Appointments Clause. Petitioner's allegation that the VA.App.Ct panel whose names appear on the Order denying Clements' employment discrimination case appeal petitions delegated its Article III judicial power to non-judge court employees in their adjudicating Petitioner's appeal with no actual judicial scrutiny, if true, is an act of usurping the President's power of appointing Article III judges; and therefore is in violation of the Appointments Clause.

Petitioner's said allegation in his 2nd.Am.Cplt that his timely filed employment discrimination case appeal petitions were handled entirely by non-judge staff personnel of the VA.App.Ct Clerk's office with no actual or meaningful judicial supervision, if true, is a "structural constitutional" violation of the Appointments Clause by the VA.App.Ct because it

would be an unauthorized act of the judicial branch's aggrandizing its power at the expense of the executive branch. Staff attorneys and clerks are employees of the court, but they are not "inferior officers" as intended by the Appointments Clause–they are not only not Article III judges, they are not judges.

> the Appointments Clause "focuses on the danger of one branch's aggrandizing its power at the expense of another branch" and "preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power."

*Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 878 (1991).

> The inexorable command of [Article III] is clear and definite: The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III.

*Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58-59

**1. Petitioner is not engaging in "sandbagging":**

> ... the practice of "sandbagging": suggesting or permitting, for strategic reasons, that the trial court pursue a

> certain course, and later–if the outcome is unfavorable–claiming that the course followed was reversible error.

*Freytag, supra,* at 895. Petitioner, as a *pro se* litigant, had no reason to believe that the VA.App.Ct panel allegedly "screened" away actual judicial scrutiny from his employment discrimination suit appeal petitions until after he had read abovementioned Professor Pether's law journal paper, *Sorcerers, Not Apprentices, ...,* in February, 2008. To the best of Petitioner's knowledge, said Professor Pether's paper is the first and only authoritative investigation of federal appeals courts' enabling non-judges to adjudicate appeals of *pro se* appellants.

**2. Petitioner is likely to prevail on the merits of his claim:**

Petitioner is likely to prevail on the merits of his claim that the VA.App.Ct panel delegated its Article III judicial powers to non-judge court employees, thereby enabling said employees to adjudicate Clements' employment discrimination case appeal petitions in violation of the Appointments Clause. As evidenced by the copy of pages of the transcript of the VA.Dist.Ct hearing of motions attached to both his said proposed 1st.Am.Cplt and his said proposed 2nd.Am.Cplt as "Exhibit A," Clements succeeded in getting on the VA.Dist.Ct record a genuine dispute of material fact; and the causal element of his retaliatory discharge claim with no objection by the defendants. Clements will prove through his discovery in the

District Court below that neither the VA.Dist.Ct nor the VA.App.Ct can deny that said genuine dispute of material fact and causal element in support of Clements' claims were on the VA.Dist.Ct record *before* the VA.Dist.Ct ruled on defendants' motion for summary judgment. Only two things can explain why the VA.App.Ct found no reversible error in the VA.Dist.Ct ruling: Either the VA.App.Ct panel of judges named on its per curiam opinion are so incompetent that they cannot recognize a genuine dispute of material fact or causal element when they see one; or, the panel delegated their Article III judicial powers to non-judge court employees, and allowed them to adjudicate Clements' appeal petitions. In the event the latter proves true–as is alleged by Petitioner–then the merits of Clements' appeal of the VA.Distr.Ct's granting of defendants' motion for summary judgment in his employment discrimination case to this day have not been reached by any court.

**II. The Court of Appeals Has Entered a Decision That Sanctions the District Court's Deciding an Important Federal Question in a Way That Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings, as to Call for an Exercise of this Court's Supervisory Power.**

The Court of Appeals states, in part, in its Order denying Petitioner's motion for summary reversal:

> ... The district court did not abuse its discretion in denying on futility grounds

> appellant's motion to vacate and for leave to file an amended complaint, as appellant's amended complaint challenging Supreme Court Rules 10 and 20.1 could not have survived a motion to dismiss. ...

See Appeals Court Order filed July 11, 2008, at 1. See also Pet. App. at 6a.

**A. The Appeals Court Decision Is Inconsistent With Its Holding In *Moore v. Agency for International Development*, 994 F.2d 874 (D.C. Cir. 1993).**

Case law establishes that district courts should give the *pro se* litigant at least minimal notice of the District of Columbia Circuit's pleading requirements. The District Court gave Petitioner no guidance of any kind, before ordering that his case be dismissed; nor before denying his motion for leave to amend his complaint. Therefore, this Court should remand with instructions for the District Court to allow Petitioner to amend his complaint. "Moreover, the district court should give the pro se litigant at least minimal notice of our pleading requirements. ..." *Moore*, *id.*, at 877.

Petitioner brought this to the attention of the District Court: in his timely filed Memorandum of Points and Authorities In Support Of Plaintiff's Motion To Vacate; And For Leave To File First Amended Complaint, DE 15 (entered July 13, 2007) at 2, 3, and; in his timely filed Reply in opposition to Defendants'

opposition, DE 17 (entered August 7, 2007) at 2.

Petitioner also brought abovementioned *Moore* holding to the attention of the Court of Appeals: in Appellant's Opposition to Appellees' Motion for Summary Affirmance (hereinafter referred to as "Appellant's Opposition") (filed May 18, 2008) at 2; in Appellant's Response in Support of Appellant's Motion for Remand (filed June 23, 2008) at 1, 2, and; in Appellant's Petition for Rehearing and Rehearing en Banc (filed August 25, 2008) at 2, 9.

Unless this Court holds that federal appeals court judges' delegating their Article III appellate judicial powers to non-judge staff personnel in said personnel's handling appeal petitions with no actual or meaningful judicial supervision is beyond constitutional challenge; and that Supreme Court Rules 10 and 20.1 are beyond constitutional challenge, Petitioner should be allowed to amend his complaint.

**B. The Appeals Court Decision Sanctions the District Court's Shrinking from its Invoked Duty of Judicial Review.**

**1. The Appeals Court Decision Effectively Sanctions the District Court's Failure to Address Petitioner's Federal Question of First Impression Properly Brought Before It.**

Petitioner, in his proposed 1st.Am.Cplt subject of the District Court's Order denying his motion for leave to amend, at ¶¶ 2, 3, 4, 44 thru 49, states:

**The Congress of the United States ... has authority over and is responsible for said S.Ct. Rules [10 and 20.1]. Under 28 U.S.C. § 2071, Congress granted Defendant Supreme Court rulemaking authority; but 28 U.S.C. § 2074 requires Defendant Supreme Court to submit proposed rules to Congress for approval before they become effective. Therefore, Congress is responsible and accountable for unconstitutional Rules drawn up by Defendant Supreme Court. ... Said S.Ct. Rules are unconstitutional on their face, and applied to Plaintiff because said S.Ct Rules cannot be squared with the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution ... Defendant Supreme Court has provided clear authority on the constitutional requirement that the lower appeals courts provide fair, effective and meaningful appeals. "... Due process requires that a right to appeal be a right to an "'adequate and effective' appeal" which is "more than a 'meaningless ritual.'" *Id.* At 393, 394, 105 S.Ct. At 834 (quoting *Griffin v. Illinois*, 351 U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956), and *Douglas v. California*, 372 U.S. 353, 358, 83 S.Ct. 814, 817, 9 L.Ed.2d 811 (1963)::." *Burkett v. Cunningham*, 826 F.2d 1208 at 1221. ...**

> COUNT I (Due Process Clause of Fifth and Fourteenth Amendments ...

Plaintiff also alleges supporting facts with specificity.

Because the constitutionality of Supreme Court Rules 10 and 20.1 have never before been challenged at least on Due Process grounds in a court of law, Petitioner's Due Process claim is an important federal question of first impression that should have been reviewed by the District Court below. The following citation was presented to the Appeals Court in said Appellant's Opposition at 7:

> ... Even when made under the more discretionary *Brillhart* doctrine, a decision to abstain in this case would constitute an abuse of discretion in light of the important federal question. ... To resolve novel questions of federal law, however, is quintessentially our obligation. ... '[A] federal question of first impression must all but demand that the federal court hear the case. ...'

*Youell v. Exxon Corporation*, 74 F.3d 373, 374, 376 (2d Cir. 1996).

The Appeals Court and District Court appear to have taken the position that there are *no* facts that Petitioner could allege that invoke judicial review of Supreme Court Rules 10 and 20.1. The District Court's failure to cite supporting precedent; failure to cite

supporting text; failure to cite supporting policy are indicia of a federal question of first impression.

### C. The Appeals Court Decision Sanctions the District Court's Relying on A Circular–Therefore Insufficient–Reason for Its Ground of Futility.

The Appeals Court affirmed the District Court's denying on futility grounds Petitioner-plaintiff's motion for leave to amend his complaint. The District Court, in part, states–*without citing any supporting precedent, text or policy*–in its Order denying said Petitioner-plaintiff's motion:

> In short, the plaintiff cannot plead around the fact that the Supreme Court is neither constitutionally nor statutorily required to accept his petitions for a writ of certiorari. The plaintiff's proffered amended complaint, if accepted for filing, would only be subject to dismissal once again . . . His amendments are therefore futile. . .

See Order, DE 19 (Entered January 15, 2008), at 5; Pet. App. at 12a. Said District Court statement is an example of circular reasoning, or begging the question. Said District Court's finding is, in essence:

> Supreme Court Rules 10 and 20.1 are not unconstitutional because they are constitutional. Therefore, any challenge

> as to the constitutionality of said Rules is futile.

See Petitioner-appellant's Motion for Remand received by the Appeals Court on April 7, 2008, at 2.The District Court is assuming its premise that Supreme Court Rules 10 and 20.1 are not unconstitutional–neither facially, nor as applied to Petitioner's case in the context of the facts alleged–is a fact, as if it has been decided by a court of law. Such is not the case.

> Begging the question occurs when the argument assumes the conclusion in a premise of the argument and results in circular reasoning. ... Judge Learned Hand observed that "no other single fault has done more to confuse the law and to disseminate litigation: than the fallacy of begging the question. [Thomas Walter Swan, *Hand*, 57 Yale L.J. 107, 170 (1947).]

Waicukauski, R.; Sandler, P.; Epps, J., 2001. The Winning Argument, p. 58. Section of Litigation, American Bar Association.

Circular reasoning is an insufficient reason for the ground of futility. Petitioner presented this point and the following citation to the Appeals Court in Appellant's Opposition to Appellees' Motion for Summary Affirmance; and Reply to Appellees' Opposition to Motion for Remand filed May 19, 2008,

at 5, 6:

> ... The district court's opinion invokes the permissible ground of futility, but provides no explanation of why the appellant's specific claims are futile beyond the overly broad speculation that the challenged regulations will survive any conceivable standard of review. When a district court denies a motion to amend, it must do more than name a reason; it must explain its reason and that reason must be sufficient. *See Carribean Broad. Sys., Ltd. V. Cable & Wireless* PLC, 148 F.3d 1080, 1084 (D.C.Cir.1998). ... Perhaps these and other claims are indeed futile, but we cannot find a reasoned explanation in a simple reference to futility, 'particularly in light of the policy in favor of hearing cases on their merits.' *Id.* Accordingly, we remand this case ..."

*Henderson v. Stanton*, 172 F.3d 919 (C.A.D.C. 1998).

Petitioner respectfully submits that, by the District Court's relying on circular reasoning as its reason for the ground of futility, the District Court has effectively given no *justifying* reason for its ground of futility in its denial of Clements' motion to amend. There being no justifying reason, the District Court's denying Petitioner-plaintiff's motion for leave

leave to amend his complaint is an abuse of discretion that should be reversed:

> ... Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

*Foman v. Davis*, 371 U.S. 178 (1962) at 182.

## CONCLUSION

For the reasons given herein above, *pro se* Petitioner-plaintiff Clyde E. Clements, Jr. prays that the within Petition be granted, and; that the judgment of the Court of Appeals be reversed and remanded with instructions for the District Court to grant Petitioner leave to file an amended complaint.

January 28, 2009 Respectfully submitted,

Clyde E. Clements, Jr. pro se
Post Office Box 3391
Lynchburg, Virginia 24503
(434) 845-2310

# APPENDIX

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 08-5065** **September Term 2008**

**1:06-cv-01809-RBW**

**Filed On:** October 30, 2008

Clyde E. Clements, Jr.,

Appellant

v.

Michael B. Mukasey, In his official capacity of U.S. Attorney General and John G. Roberts, In his official capacity of Chief Justice, Supreme Court of the United States,

Appellees

**BEFORE:** Sentelle, Chief Judge, and Ginsburg, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

**ORDER**

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by

any member of the court for a vote, it is

**ORDERED** that the petition be denied.

**Per Curiam**

**FOR THE COURT:**
Mark J. Langer, Clerk
BY: /s/ Michael C. McGrail
Deputy Clerk

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 08-5065** **September Term 2008**

**1:06-cv-01809-RBW**

**Filed On:** October 30, 2008

Clyde E. Clements, Jr.,

Appellant

v.

Michael B. Mukasey, In his official capacity of U.S. Attorney General and John G. Roberts, In his official capacity of Chief Justice, Supreme Court of the United States,

Appellees

**BEFORE:** Sentelle, Chief Judge, and Ginsburg and Randolph, Circuit Judges

**ORDER**

Upon consideration of appellant's petition for panel rehearing filed on August 25, 2008, it is

**ORDERED** that the petition be denied.

**Per Curiam**

**FOR THE COURT:**
Mark J. Langer, Clerk
BY: /s/ Michael C. McGrail
Deputy Clerk

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 08-5065** **September Term 2007**

**1:06-cv-01809-RBW**

**Filed On**: July 11, 2008

Clyde E. Clements, Jr.,

Appellant

v.

Michael B. Mukasey, In his official capacity of U.S. Attorney General and John G. Roberts, In his official capacity of Chief Justice, Supreme Court of the United States,

Appellees

**BEFORE:** Sentelle, Chief Judge, and Ginsburg and Randolph, Circuit Judges

**ORDER**

Upon consideration of the motion for summary reversal, the opposition thereto and motion for summary affirmance, the reply to the opposition to the motion for summary reversal and opposition to

the motion for summary affirmance, the reply to the opposition to the motion for summary affirmance, the motion for leave to file a surreply, and the lodged surreply, it is

**ORDERED** that the motion for leave to file a surreply be denied. It is

**FURTHER ORDERED** that the motion for summary reversal be denied and that the motion for summary affirmance be granted. The district court did not abuse its discretion in denying on futility grounds appellant's motion to vacate and for leave to file an amended complaint, as appellant's amended complaint challenging Supreme Court Rules 10 and 20.1 could not have survived a motion to dismiss. See generally James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1099 (D.C. Cir. 1996). The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

**Per Curiam**

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

CLYDE E. CLEMENTS, JR.,
Plaintiff,

v. Civil Action No. 06-1809 (RBW)

MICHAEL B. MUKASEY,
Attorney General,

-and-

JOHN G. ROBERTS,
Chief Justice, United States Supreme Court
Defendants.

**ORDER**

Clyde Clements, Jr., the plaintiff in this civil suit, seeks to challenge the validity of Supreme Court Rules 10 and 20.1, which provide in pertinent part that the granting of petitions for writs of certiorari and mandamus are "not a matter of right, but of judicial discretion." Sup. Ct. R. 10 (2005); see also Sup. Ct. R. 20.1 (same). On June 27, 2007, the Court entered an order granting the defendants' motion to dismiss this case for failure to state a claim and dismissing the plaintiff's complaint in its entirety (the "Dismissal Order").[1] Currently before

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[1] The plaintiff's original complaint, filed October 19,
(continued...)

the Court is the plaintiff's request for leave to file an amended complaint. Motion to Vacate[] and For Leave to File Amended Complaint (the "Pl.'s Mot.") at 1.[2] After carefully reviewing the Court's Dismissal Order, the plaintiff's motion, and all memoranda and

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[1] (. . . continued)
2006, names Alberto R. Gonzales, at that time the Attorney General of the United States, as the defendant in this civil case. The Court has substituted Attorney General Mukasey as the defendant in lieu of former Attorney General Gonzales pursuant to Federal Rule of Civil Procedure 25(d)(1).

[2] Although the plaintiff's motion is captioned as a motion to vacate the Court's Dismissal Order, and although he requests in his motion that the Court "vacate its [o]rder entered June 27, 2007," Pl.'s Mot. at 1, the plaintiff does not actually argue that the Court should reconsider its Dismissal Order, but rather asserts that his proffered amended complaint would remedy the defects in the plaintiff's original complaint identified by the Court in that order, Memorandum of Points and Authorities in Support of Plaintiff's Motion to vacate[] and for Leave to File First Amended Complaint at 2-3 (asserting, inter alia, that the plaintiff's proffered amended complaint "does not contain the allegations of judicial fraud and judicial tyranny" found in his original complaint and that the proffered amended complaint is pled with greater specificity). The Court therefore construes the plaintiff's motion solely as a motion for leave to file an amended complaint.

exhibits relating thereto,[3] the Court concludes for the reasons that follow that it must deny the plaintiff's motion for leave to file an amended complaint.

Federal Rule of Civil Procedure 15 provides that leave to amend a pleading "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a)(2). As explained by the Supreme Court in Foman v. Davis, 371 U.S. 178 (1962):

> In the absence of any apparent or declared reason–such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.–leave should, as the rules require, be freely given.

Id. at 182 (emphasis added). "Within these bounds, a district court has discretion to grant or deny leave to

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[3] In addition to the Court's prior Dismissal Order (and the underlying documents considered by the Court before entering that order) and the plaintiff's motion, the Court considered the following documents in reaching its decision: (1) the defendants' Opposition to Motion to Vacate and [for] Leave to File Amended Complaint, (2) the Plaintiff's Reply Memorandum in Opposition to Defendants' Opposition to Plaintiff's Motion to Vacate and [for] Leave to File Amended Complaint, and (3) the plaintiff's uncaptioned notice of errata on the Court's docket on December 7, 2007.

amend under Rule 15(a)." Atchinson v. District of Columbia, 73 F.3d 418, 426 (D.C. Cir. 1996). Thus, a district court "may deny a motion to amend a complaint as futile . . . if the proposed claim would not survive a motion to dismiss." James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1099 (D.C. Cir. 1996).

In this case, the plaintiff's request for leave to file an amended complaint must be denied as futile. The sole count alleged in the proposed amended complaint is that Supreme Court Rules 10 and 20.1 "are in violation of the Due Process Clause[s] of the Fifth and Fourteenth Amendments" because "they enabled [various federal and state courts of appeals and the Virginia Supreme Court] to deny [the p]laintiff a fair, effective[,] and meaningful appeal, which is fundamentally unfair." First Amended Complaint (the "Am. Compl.") ¶ 48;[4] see also id. ¶ 1 ("[Supreme Court Rules 10 and 20.1] enable lower appeals courts to apply, with impunity a practice of affirming decisions of courts of first instance that said lower appeals courts know or should know are clearly erroneous and reversible"); id. ¶ 3 ("[Supreme Court Rules 10 and 20.1] are unconstitutional on their face, and as applied to [the p]laintiff because said [Supreme Court] Rules cannot be squared with the Due Process Clause[s] of the Fifth and Fourteenth Amendments"). As the Court explained in its Dismissal Order, however, "the Supreme Court

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[4] The plaintiff's proffered amended complaint is attached as an unmarked exhibit to his motion for leave to amend his complaint.

has conclusively held that '[t]here is, of course, no constitutional right to an appeal.'" Dismissal Order at 6 (quoting Jones v. Barnes, 463 U.S. 745, 751 (1983)). "Thus, while the plaintiff is entitled to an appeal as a matter of right to the appropriate federal circuit court of appeals," that right "does not extend to the Supreme Court, and the Supreme Court Rules that permit discretionary review of petitions for writs of certiorari and mandamus are therefore not facially unconstitutional." Id.[5]

Insofar as the plaintiff's proffered amended complaint challenges the constitutionality of Supreme Court Rules 10 and 20.1 as those rules

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[5] The plaintiff cites Burkett v. Cunningham, 826 F.2d 1208 (3d Cir. 1987), as "authority on the constitutional requirement that the lower appeals courts provide fair, effective[,] and meaningful appeals." Am. Compl. ¶ 4 (citing Burkett, 826 F.2d at 1221 (quoting Evitts v. Lucey, 469 U.S. 387, 394 (1985) (internal quotations and citation omitted))). In actuality, these cases stand for the incontrovertible principle that "the Due Process clause protects the right to direct appeal when that right is guaranteed by the state." Burkett, 826 F.2d at 1221 (emphasis added); Evitts, 469 U.S. at 394 (holding that "if a state has created appellate courts as an integral part of the system for finally adjudicating the guilt or innocence of a defendant, . . . the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution" (internal quotation and citation omitted) (emphasis added)). In this case, Congress has given the Supreme Court discretion as to which, if any, writs of certiorari it will accept, and the Supreme Court Rules at issue here reflect that discretion.

have been applied to the plaintiff, the factual allegations proffered by the plaintiff do not support such a claim. The plaintiff does not allege, for example, that the Supreme Court's facially neutral rules work to the disadvantage of petitioners of a certain economic status. See Griffin v. Illinois, 351 U.S. 12, 14-20 (1956) (declaring unconstitutional state law that required indigent criminal defendants to pay for their own trial transcripts because the law "discriminate[d] against some convicted defendants on account of their poverty"). Instead, he asserts that the Supreme Court's rules are unconstitutional as applied to him because "they make no exception for those petitioners who in words or in substance complain of unfair, ineffective[,] and meaningless appeals below." Am. Compl. ¶ 5. But as the Supreme Court is not required to accept any petitions for a writ of certiorari or a writ of mandamus, its failure to create a special exception for those petitioners who, like the plaintiff, subjectively believe that the appellate courts have not conducted a fair and honest review of their appeals–in other words, the Supreme Court's failure to treat petitions like those filed by the plaintiff more favorably than other types of petitions–can hardly be described as conduct of an unfair, let alone unconstitutional, character.

In short, the plaintiff cannot plead around the fact that the Supreme Court is neither constitutionally nor statutorily required to accept his petitions for a writ of certiorari. The plaintiff's proffered amended complaint, if accepted for filing, would only be subject to dismissal once again for

failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). His proposed amendments are therefore futile. It is accordingly

**ORDERED** that the plaintiff's Motion to Vacate[] and for Leave to File Amended Complaint is **DENIED.**

**SO ORDERED** this 15th day of January, 2008.

REGGIE B. WALTON
United States District Judge

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

CLYDE E. CLEMENTS, JR.,
Plaintiff,

v. Civil Action No. 06-1809 (RBW)

ALBERTO GONZALES, et al.,
Defendants.

**ORDER**

On October 19, 2006, Clyde E. Clements, Jr. ("the plaintiff"), acting pro se, brought this action against the United States Supreme Court ("the defendant") as a challenge to the validity of Supreme Court Rules 10 and 20.1, which provide that the granting of petitions for writs of certiorari and mandamus are "not a matter of right, but of judicial discretion."[1] Sup. Ct. R. 10 (2005); see also Sup. Ct. R. 20.1 (2005). This action had been preceded by the

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[1] As reflected in the caption above, the plaintiff also names Attorney General Alberto Gonzales as a defendant in his complaint, although he fails to refer to him thereafter. Complaint ("Compl.") at 1; see generally Compl. In addition, the plaintiff refers in passing to the United States Congress as a defendant in the action. Id. ¶ 10. Because the plaintiff fails to make any factual allegations regarding either Attorney General Gonzales or the United States Congress, the Court sua sponte dismisses the plaintiff's complaint against them for failure to state a claim upon which relief can be granted.

plaintiff's submission of seven petitions for review by the United States Supreme Court.[2] Complaint ("Compl.") ¶¶ 12-19. The Supreme Court denied each petition without reaching the merits of the plaintiff's claims.[3] Id. The plaintiff's complaint asserts that the Supreme Court's practice of discretionary review violates the United States Constitution and the federal statute which governs the appealability of final decisions of federal district courts. Compl. ¶ 4; see 28 U.S.C. § 1291 (2000) (providing that the various circuit courts of appeals shall have "jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court");

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[2] In the underlying suit in which the petitions were filed, the plaintiff alleges that the United States Court of Appeals for the Fourth Circuit, the United States District Court for the Western District of Virginia, the Supreme Court of Virginia and the Amherst County, Virginia Circuit Court "intentionally deprived" him of his constitutional rights by repeatedly dismissing his employment discrimination claims. Comp. ¶ 2.

[3] The Supreme Court denied (1) Plaintiff's Petition for Rehearing, Case No. 95-1314 on June 3, 1996; (2) Plaintiff's Petition for a Writ of Certiorari, Case No. 95-1360 on April 15, 1996; (3) Plaintiff's Petition for a Writ of Certiorari, Case No. 96-1360 on April 14, 1997; (4) Plaintiff's Petition for Rehearing, Case No. 97-1260 on May 18, 1998; (5) Plaintiff's Petition of a Writ of Certiorari, Case No. 97-1260 on March 23, 1998; (6) Plaintiff's Petition for a Writ of Mandamus, Case No. 05-689 on February 21, 2006; and (7) Plaintiff's Petition for Rehearing, Case No. 05-689 on April 17, 2006. Compl. ¶¶ 12-19.

see also 28 U.S.C. § 2071(a)(2000) (stating that Supreme Court Rules must be "consistent with acts of Congress"). Specifically, the plaintiff contends that the Supreme Court's denial of his petitions without reaching the merits of his claims "has resulted in a judicial tyranny where [the] Defendant Supreme Court enables lower federal and state courts to enter, with impunity, decisions [the] lower courts know to be erroneous, for the purpose of giving partial, unfair treatment to cases before them." Compl. ¶ 2.

Currently before the Court is the defendants' motion to dismiss the plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Defs.' Mot.").[4]

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[4] The following papers have been submitted in connection with this motion: (1) Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss ("Defs.' Mem."); (2) Memorandum of Points and Authorities in Support of Plaintiff's Opposition to Defendants' Motion to Dismiss ("Pl.'s Opp."); (3) Defendants' Reply in Support of Defendants' Motion to Dismiss ("Defs.' Reply"); and (4) Plaintiff's Reply to Defendants' Reply in Support of Defendants' Motion to Dismiss ("Pl.'s Surreply").

To survive a motion to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), a plaintiff must make sufficiently detailed factual allegations in his complaint "to raise a right to relief above the speculative level." Bell Atlantic Corp. v. Twombly, ___ U.S. ___, ___, 127 S. Ct. 1955, 1965 (May 21, 2007). In evaluating a Rule 12(b)(6) motion, the Court "must accept as true all of the factual allegations contained in the

(continued...)

The defendants argue that the complaint fails to

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[4] (. . . continued)
complaint," Erickson v. Pardus, ____ U.S. ____, ____, 127 S. Ct 2197, 2200 (June 4, 2007) (internal quotation marks and citations omitted), and "grant the plaintiff the benefit of all inferences that can be derived from the facts alleged," Trudeau v. FTC, 456 F.3d 178, 193 (D.C. Cir. 2006) (internal quotation marks and citations omitted). However, "a plaintiff's obligation to provide the grounds of his entitlement to relief [in his complaint] requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, ____ U.S. ____, 127 S. Ct. at 1965 (internal quotation marks and brackets omitted). Moreover, the Court need not accept inferences that are unsupported by the facts set forth in the complaint or "legal conclusion[s] couched as . . . factual allegation[s]." Trudeau, 456 F.3d at 193 (internal quotation marks and citations omitted). For the purposes of a Rule 12(b)(6) motion, the Court may only consider the facts alleged in the complaint, any documents attached as exhibits, and matters about which the Court may take judicial notice. EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624-25 (D.C. Cir. 1997). Finally, the pleadings of pro se parties "[are] to be liberally construed, and a pro se complaint, however inartfully pleaded, must be held to less stringent statndards than formal pleadings drafted by lawyers." Erickson, ___ U.S. at ___, 127 S. Ct. At 2200 (internal quotation marks and citations omitted). Nonetheless, "[a]lthough a court will read a pro se plaintiff's complaint liberally, a pro se complaint[, no less than any other complaint,] must present a claim on which the Court can grant relief." Chandler v. Roche, 215 F. Supp. 2d 166, 168 (D.D.C. 2002) (citing Crisafi v. Holland, 665 F.2d 1305, 1308 (D.C. Cir. 1981)); see McNeil v. United States, 508 U.S. 106, 113 (1993) (stating that the Supreme Court "[has] never suggested that procedural rules in ordinary civil
(continued. . .)

state a claim upon which relief can be granted because the plaintiff has been afforded the opportunity to pursue appeals in both state and federal appellate courts, Defs.' Mot. at 3, and the plaintiff's dissatisfaction with the results of these appeals does not constitute a valid legal claim, Defs.' Reply at 3.[5] The plaintiff responds that he was "denied a legitimate appeal as a matter of right" because the trial and appellate courts were biased against employees alleging workplace discrimination, Compl. ¶ 2, and that the Supreme Court is therefore compelled to grant his petitions for review, id. ¶ 4. For the reasons stated below, the Court concludes that the plaintiff has failed to state a claim upon which relief can be granted. It therefore

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[4] (. . . continued)
litigation should be interpreted as to [wholly] excuse mistakes by those who proceed without counsel") (footnote omitted).

[5] The defendants also contend that 28 U.S.C. § 2401 bars the plaintiff's claims regarding the five petitions denied prior to 2000, because the six year statute of limitations for civil actions against the United States had expired prior to the filing of the complaint in this case. Defs.' Mot. at 4; see also 28 U.S.C. § 2401 (2000) (stating that "every civil action commenced against the United states shall be barred unless the complaint is filed within six years after the right of action first accrues"). However, because the Court concludes that the plaintiff's complaint is plainly without merit, the Court need not reach the statute of limitations issue.

grants the defendants' motion to dismiss.[6] _____

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[6] It is resoundingly clear that plaintiff's statutory and constitutional arguments fail to state any claim upon which relief can be granted and that the defendant's Rule 12(b)(6) motion should be granted and the plaintiff's complaint dismissed for that reason. However, as the Supreme Court has repeatedly observed, "courts . . . have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." Arbaugh v. Y&H Corp., 546 U.S. 500, 509 (2006) (citation omitted). Accordingly, the Court also notes as an initial matter that it lacks jurisdiction over the plaintiff's complaint in two distinct respects.

To begin with, the plaintiff has identified no private right of action that empowers him to bring suit for an asserted violation of 28 U.S.C. §§ 1291 or 2071. "[P]rivate rights of action to enforce federal law must be created by Congress," Alexander v. Sandoval, 532 U.S. 275, 286 (2001) (citation omitted), and "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979) (internal quotation marks and citation omitted); see also Tax Analysts v. IRS, 214 F.3d 179, 185 (D.C. Cir. 2000) (observing that "violation of a federal statute alone is inadequate to support a private cause of action"). Courts must therefore determine whether a congressional statute "displays an intent to create not just a private right but also a private remedy." Sandoval, 532 U.S. at 286 (citation omitted); see Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (reiterating that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases") (citations omitted). When undertaking such an inquiry, "[s]tatutory intent . . . is determinative," Sandoval, 532 U.S. at 286 (citation omitted),

(continued . . .)

[6] (...continued)
and "legal context matters only to the extent it clarifies text," id. at 288. If a statute does not clearly indicate the existence of a privately enforceable remedy, "courts may not create one, no matter how desirable that might be as a policy matter[] or how compatible with the statute." Id. at 286-87 (citations omitted). Here, neither § 1291 nor § 2071 evince any congressional intent to allow individuals to bring a legal action alleging that a particular Supreme Court Rule is not "consistent with [an] Act[] of Congress." 28 U.S.C. § 2071. The Court therefore concludes that no private right of action exists to enforce the statutes relied upon by the plaintiff in his complaint.

In addition, it is plain that the Court lacks subject-matter jurisdiction in this case pursuant to the doctrine of sovereign immunity. The Supreme Court, as a branch of the United States government, enjoys sovereign immunity from litigation unless the prerogative has been expressly waived. See United States v. Mitchell, 445 U.S. 535, 538 (1983) (stating that "[i]t is elementary that the United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit") (internal quotation marks, ellipsis, and citation omitted); Dep't of Army v. Blue Fox, Inc., 525 U.S. 255, 260 (1999) (stating that "[a]bsent a waiver, sovereign immunity shields the [f]ederal [g]overnment and its agencies from suit") (internal quotation marks and citation omitted); see also Council on Am. Islamic Relations v. Ballenger, 444 F.3d 659, 666 (D.C. Cir. 2006) (stating that "[s]overeign immunity bars suits against the United States absent an explicit and unequivocal waiver") (citation omitted). In this case, the plaintiff has not proffered, nor can the Court find, any "explicit and unequivocal waiver" of the Supreme Court's sovereign immunity from suit. Ballenger, 444 F.3d at 666
(continued...)

## ANALYSIS

The United States Constitution confers upon the Supreme Court "appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. Const. art. III, § 2, cl. 2. Pursuant to its power to make regulations under Article III, § 2, Congress granted the Supreme Court the Authority to fashion procedural rules for itself. 28 U.S.C. § 2071 (stating that "the Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business"). However, such rules must be "consistent with Acts of Congress." Id.

Here, the plaintiff argues that Supreme Court Rules 10 and 20.1 conflict with 28 U.S.C. § 1291 ("Section 1291"), which, according to the plaintiff, "compels the judicial branch to provide litigants with at least one appeal as a matter of right from a [United States] district court[] or state circuit court decision." Compl. ¶ 4. The plaintiff further contends that where state and federal appellate courts issue decisions that are "a result of judicial fraud[] or of other clear and prejudicial abuses of discretion," id. ¶ 3, Section 1291 provides that, notwithstanding

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[6] (. . . continued)
(citation omitted). The plaintiff's complaint must therefore be dismissed for lack of subject-matter jurisdiction on this point as well.

Supreme Court Rules, "[the] Defendant Supreme Court must treat a petition for review of the merits of such cases as an appeal of right," id. ¶ 4. In actuality, however, Section 1291 simply confers upon the courts of appeals "jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291. Furthermore, Congress has expressly delineated the discretionary nature of petitions for writs of certiorari and mandamus presented to the Supreme Court. 28 U.S.C. § 1254 (2000) (stating that "[c]ases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case") (emphasis added); 28 U.S.C. § 1651(a) (2000) (stating that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law") (emphasis added); see also Durham v. United States, 401 U.S. 481, 483 n.* (1971) (observing that "appeals [to circuit courts of appeals] are a matter of right while [the Supreme Court's] decisions on certiorari [and mandamus] petitions are wholly discretionary"), overruled on other grounds, Dove v. United States, 423 U.S. 325, 325 (1976). Accordingly, the Court concludes that Supreme Court Rules 10 and 20.1 are entirely "consistent with Acts of Congress." 28 U.S.C. § 2071.

The plaintiff also makes a vague and unsupported assertion that Supreme Court Rules 10

and 20.1 are facially unconstitutional. Compl ¶ 5. However, the Supreme Court has conclusively held that "[t]here is, of course, no constitutional right to an appeal." Jones v. Barnes, 463 U.S. 745, 751 (1983). As the Supreme Court observed on another occasion,

> [a]n appeal . . . is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment . . . was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review. A citation of authorities upon the point is unnecessary. _____

McKane v. Durston, 153 U.S. 684, 687 (1894). Thus, while the plaintiff is entitled to an appeal as a matter of right to the appropriate federal circuit court of appeals, see Durham, 401 U.S. 481, 483 n.* (1971); Fed. R. App. P. 3, such right does not extend to the United States Supreme Court, and the Supreme Court Rules that permit discretionary review of petitions for writs of certiorari and mandamus are therefore not facially unconstitutional.

Finally, the plaintiff argues that Supreme Court Rules 10 and 20.1 are unconstitutional as applied to him because the denial of his petitions has resulted in a "judicial tyranny where Defendant Supreme Court enables lower federal and state courts to enter, with impunity, decisions [the] lower courts know to be erroneous, for the purpose of

giving partial, unfair treatment to cases before them." Compl. ¶ 2. Notwithstanding the plaintiff's nebulous and unsubstantiated allegations of fraud and conspiracy by various state and federal courts, the facts asserted in the complaint itself demonstrate that the plaintiff has had extensive opportunities to seek appellate relief on numerous occasions from both the United States Court of Appeals for the Fourth Circuit and the Virginia Supreme Court. Id. ¶¶ 2-3. Thus, because the plaintiff provides no factual support for his improbable and wholly conclusory allegations that four state and federal trial and appellate courts "intentionally deprived [him] of his [c]onstitutionally guaranteed rights by entering decisions said federal and state courts knew to be erroneous," Compl. ¶ 2, and because the Court can envision no set of facts that the plaintiff could realistically prove that would corroborate his claim of pervasive "judicial tyranny," Pl.'s Opp. at 2, and "judicial fraud," Compl. ¶ 3, directed against him, the Court concludes that the plaintiff's complaint has clearly failed to state a claim upon which relief can be granted. Accordingly, it is hereby

**ORDERED** that the defendants' motion to dismiss is GRANTED. It is further

**ORDERED** that this case be dismissed with prejudice.

**SO ORDERED** this 27th day of June, 2007.

REGGIE B. WALTON
United States District Judge